89

Supreme Court, U.S.
FILED

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No. (1)

In the Supreme Court of the United States

LAWRENCE K. SILVA, Ph. D.,

Petitioner

v.

BOWIE STATE UNIVERSITY, Part of the University System of Maryland,

Respondent

On Amended Petition for Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

AMENDED PETITION FOR WRIT OF CERTIORARI

LAWRENCE K. SILVA, Ph. D.
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616665 46p

I. QUESTIONS PRESENTED FOR REVIEW

Petitioner timely filed a claim with the Maryland Commission for Human Relations alleging discrimination and retaliation for prior EEO activity following his termination from Bowie State University. Petitioner initially filed his claim in the Circuit Court for Prince George's County, Maryland. Bowie State University removed the action to the United States District Court for the district of Maryland. On or about May 16, 2005, Petitioner filed a Second Amended Complaint. Soon thereafter, Bowie State University filed its Motion to Dismiss. A hearing on Respondent's Motion to Dismiss was held on June 21, 2005, before Judge Roger Titus. At the conclusion of the hearing, Judge Titus granted Respondent's Motion to Dismiss, accepting Respondent's argument that (1) requiring Petitioner to undergo an independent medical examination (IME) did not constitute an adverse employment action and (2) Petitioner's termination was not causally connected to his EEO claim but to his refusal to undergo the IME.

Petitioner timely filed his notice of appeal with the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed in part, vacated in part, and remanded the matter for further proceedings. Specifically, the Fourth Circuit found that the District Court had erred in granting the University's motion to dismiss Petitioner's retaliatory discharge claim, stating that the 10-week lapse of time sufficiently established a prima facie case of retaliation. The Court then remanded for further proceedings as to whether a causal connection existed between the termination and Petitioner's prior EEO activity.

On remand, the parties did not reopen discovery. Respondent filed a Motion for Summary Judgment. A hearing on Respondent's Motion for Summary Judgment was held on January 22, 2007, before Judge Roger Titus. At the conclusion of the hearing, Judge Titus granted Respondent's Motion for Summary Judgment, accepting Respondent's argument that the adverse employment action – the termination – was not causally connected to this EEO claim but to Petitioner's refusal to undergo the IME.

Petitioner again timely appealed to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit, based on the informal briefs filed by the parties, affirmed the District Court decision in an unpublished opinion issued on August 2, 2007. Petitioner timely filed a petition for rehearing and rehearing en banc on or about August 15, 2007. The Fourth Circuit issued its decision denying the petition for rehearing and rehearing en banc on September 21, 2007. Jurisdiction of U.S. District Court for the District of Maryland was invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343, and 1443.

The questions presented for review are:

1. Whether the District Court erred in finding that the request for the IME was justified based on the content of Petitioner's EEO complaint; and

2. Whether the District Court erred in finding that there was no indication that Petitioner's prior EEO complaints were of a similar nature, giving rise to an inference that the reason for termination was mere pretext for retaliation.

II. LIST OF PARTIES TO THE PROCEEDING

The following parties appeared before the courts below: Lawrence K. Silva, Ph.D., Bowie State University, part of the University System of Maryland. There are no intervenors or *amici* in this Court.

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V. PETITION FOR A WRIT OF CERTIORARI

Petitioner Lawrence K. Silva, Ph. D., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

VI. OPINIONS BELOW AND JURISDICTION

The opinions of the Fourth Circuit (Petitioner's Appendix 3a, 8a) are unpublished. The Court of Appeals issued its opinion on Appellant's petition for rehearing and rehearing en banc on September 21, 2007. (Pet. App. 6a). The district court opinions were made on the record; there is no written memorandum. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

VII. RELEVANT STATUTORY PROVISION(S)

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-3(a), provides in relevant part:

> *It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.*

VIII. STATEMENT

1. Petitioner is a U.S. citizen of African descent (Nigeria). His ethnic background is Yoruba (a tribe in the Western part of Nigeria). His religious affiliation is Southern Baptist. Petitioner is 57 years of age. In 2001, Petitioner filed an EEO claim against Bowie State University alleging discrimination based on national origin, religion, and age. On or about August 12, 2002, Petitioner returned to Bowie State University as part of a settlement agreement arising from this prior EEO complaint. The parties executed a settlement agreement and written employment contract. The agreements provided, among other things, that Appellant would not be required to submit to an independent medical examination. (Settlement Agreement dated April 23, 2002 (Petitioner's App. 18a); Letter from Miller & Obayashi, dated April 15, 2002 (Pet. App. 24a)). Petitioner returned to work and complied fully with the terms of agreements, fulfilling his obligations as a tenured associate professor.

2. When Petitioner was again subjected to harassment and a hostile environment, he filed a second EEO complaint with the University's EEO office. Upon reviewing Petitioner's EEO claim, Respondent demanded that Petitioner submit to an IME. The imposition of this requirement expressly contravened the terms of the settlement agreement with the University on the prior EEO claim. Therefore, Petitioner refused to submit to the IME. Respondent terminated Petitioner on April 8, 2003.

3. Petitioner timely filed the instant claim with the Maryland Commission for Human Relations. Upon receipt of his Notice of Right to Suit, Petitioner filed an

action in the Circuit Court for Prince George's County, Maryland. Respondent removed the action to the United States District Court for the District of Maryland. On or about May 16, 2005, Petitioner filed his Second Amended Complaint. Soon thereafter, Respondent filed a Motion to Dismiss. A hearing on Repondent's Motion to Dismiss was held on June 21, 2005, before Judge Roger Titus. At the conclusion of the hearing, Judge Titus granted Respondent's Motion to Dismiss, accepting Respondent's argument that (1) requiring Petitioner to undergo an IME did not constitute an adverse employment action and (2) Petitioner's termination was not causally connected to his EEO claim but to his refusal to undergo the IME.

4. Petitioner timely filed his notice of appeal, which was docketed before the United States Court of Appeals for the Fourth Circuit as 05-1760. The Fourth Circuit affirmed in part, vacated in part, and remanded the matter for further proceedings. Specifically, the Fourth Circuit found that the District Court had erred in granting the University's motion to dismiss Petitioner's retaliatory discharge claim, stating that the 10-week lapse of time sufficiently established a *prima facie* case of retaliation. The Court then remanded for further proceedings as to whether a causal connection existed between the termination and Petitioner's prior EEO activity. (Pet. App. 8a).

5. On remand, the parties did not reopen discovery. Respondent filed a Motion for Summary Judgment. A hearing on Respondent's Motion for Summary Judgment was held on January 22, 2007, before Judge Roger Titus. At the conclusion of the hearing, Judge Titus granted Respondent's Motion for Summary Judgment, accepting Respondent's argument that the adverse

employment action – the termination – was not causally connected to his EEO claim but to his refusal to undergo the IME.

6. Before the Fourth Circuit, Petitioner argued that the District Court erred in finding no relationship between Petitioner's filing of an EEO complaint and the termination decision. Specifically, the District Court erred in finding that the request for the IME was justified based on the content of Petitioner's EEO complaint. It is well-settled that a violation of the retaliation provision can be found whether or not the challenged practice ultimately is found to be unlawful. *See Childress v. City of Richmond*, 120 F.2d 476 (4th Cir. 1997). Petitioner has an absolute right to participate in the EEO process and file a claim where he believes he has been wronged; no matter what the merits of the claim may be determined, there can be no retaliation for filing it. Courts have consistently held that an employer is liable for retaliating against an individual for filing an EEO charge regardless of the validity or reasonableness of the charge. *See Id.; Wyatt v. Boston*, 35 F.3d 13, 15 (1st Cir. 1994).

7. There was sufficient evidence in the record that Respondent understood there would be no further IME demands. This was not a vague allegation by Petitioner. The demand for the IME was a material breach of the settlement agreement reached in Petitioner's prior EEO activity. Therefore, the IME demand constituted an adverse employment action, which had the effect of deterring one from complaining about discrimination or continued harassment. *See Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 2415-16 (2006)(retaliatory action exists when, in the given context, it well might dissuade a reasonable worker from

making a charge of discrimination). The elimination of the IME as a condition of reemployment was clear. (See letter from Miller & Obayashi Mediation, LLC (Pet. App. 24a). The deposition testimony submitted by Respondent in support of its motion also corroborated Petitioner's belief that the IME would only be used to justify another termination, as it had been used before. Therefore, there was sufficient evidence, if viewed in the light most favorable to the non-moving party, to rebut the University's purported nondiscriminatory reason for the termination. The evidence was sufficient to show a dispute as to a material fact which should have been left for the jury to decide. *Burlington Northern & Santa Fe Railway Co.*, 126 S. Ct. at 2417.

8. The District Court also erred in finding that there was no indication that Petitioner's prior EEO complaints were of a similar nature. While a claim for retaliation does not require a reviewing court to consider the nature of the claim that led to the filing of the charge, *see Burlington Northern*, 126 S. Ct. at 2416), the record did contain sufficient evidence of the similar nature of Petitioner's complaints, including affidavit and deposition testimony. The evidence was sufficient to show a dispute as to a material fact, giving rise to an inference that the Respondent's reason for termination was mere pretext for retaliation.

9. This petition for a writ of certiorari followed.

IX. REASONS FOR GRANTING THE WRIT

Certiorari is warranted because the Court of Appeals for the Fourth Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court and another United States court of appeals. Specifically, the Court of Appeals for the Fourth Circuit affirmed the decision of the lower court finding that the nature of Petitioner's EEO claim justified the action leading to his termination. The lower court stated that Petitioner's claim was "delusional" and therefore not protected by the retaliation provisions of Title VII of the Civil Rights Act of 1964, as amended. It is well-settled, however, that a violation of the retaliation provision can be found whether or not the challenged practice ultimately is found to be unlawful. This Court in *Burlington Northern & Santa Fe Railway Co. v. White* held that "nature of the discrimination that led to the filing of the charge" need not be considered by the reviewing court or jury. 126 S. Ct. at 2416. Further, this standard has been adopted by every circuit that has considered the issue, but has not been applied uniformly. Petitioner, and others similarly situated, have an absolute right to participate in the EEO process and file a claim where he believes he has been wronged. No matter what the merits of the claim may be determined, there can be no retaliation for filing it. *See Childress v. City of Richmond*, 120 F.2d 476 (4th C ir. 1997); *Wyatt v. Boston*, 35 F.3d 13, 15 (1st Cir. 1994). There was sufficient evidence in the record that the demand for an independent medical examination violated the settlement in Petitioner's prior EEO claim and therefore constituted an adverse employment action giving rise to an inference of retaliation. The ques-

tion of retaliation, therefore, was one for the jury to decide rather than the court in granting Respondent's motion for summary judgment.

Respectfully submitted,
Lawrence K. Silva, Ph. D.
Pro Se

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Date: April 3, 2008

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FILED: August 2, 2007

UNITED STATES COURT OF APPEALS

For the

Fourth Circuit

No. 07-1101

8:04-cv-01984-RWT

LAWRENCE K. SILVA, Ph.D.

Plaintiff – Appellant

v.

BOWIE STATE UNIVERSITY, part of the University System of Maryland

Defendant – Appellee

Appeal from the United States District Court for the District of Maryland at Greenbelt

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

_____

CLERK

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1101

LAWRENCE K. SILVA, Ph.D.,

Plaintiff – Appellant,

versus

BOWIE STATE UNIVERSITY, part of the University System of Maryland,

Defendant – Appellee.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Roger W. Titus, District Judge. (8:04-cv-01984-RWT)

Submitted: July 27, 2007
Decided: August 2, 2007

Before TRAXLER and KING, Circuit Judges, and WILKINS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Lawrence K. Silva, Appellant Pro Se. John Joseph Curran, Jr., Sara Slaff, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Lawrence K. Silva appeals from the district court's order granting summary judgment in favor of his former employer on Silva's claim of retaliatory discharge. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the court at the hearing held in January 22, 2007. See Silva v. Bowie State Univ., No. 9:04 cv-01984-RWT (D. Md. Jan. 22, 2007; filed Jan. 24, 2007 & entered Jan. 25, 2007). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

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* Silva presents on appeal a letter dated April 15, 2002, that was not before the district court. "It is well established that affidavits and exhibits not before the [district] court in making its decision are not to be considered on appeal." Kaiser Aluminum & Chem. Corp. v. Westinghouse Elec. Corp., 981 F.2d 136, 140 (4th Cir. 1992). In any event, we have reviewed the letter and conclude that it does not warrant relief on appeal.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 21, 2007

No. 07-1101
8:04-cv-01984-RWT

LAWRENCE K. SILVA, Ph.D.
Plaintiff – Appellant

v.

BOWIE STATE UNIVERSITY, part of the University System of Maryland
Defendant – Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Chief Judge Williams, Judge Traxler, and Judge King.

For the Court,
/s/ Patricia S. Connor

_____
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 1, 2007

No. 07-1101
8:04-cv-01984-RWT

LAWRENCE K. SILVA, Ph.D.
Plaintiff – Appellant

v.

BOWIE STATE UNIVERSITY, part of the University System of Maryland
Defendant – Appellee

MANDATE

The judgment of this Court, entered 8/2/07, takes effect this date.

A certified copy of this Court's judgment and a copy of its decision are issued to the district court and constitute the mandate of this court.

/s/ Patricia S. Connor

CLERK

JUDGMENT

FILED: February 10, 2006

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1760

CA-04-1984-RWT

LAWRENCE K. SILVA, Ph.D.
Plaintiff – Appellant

v.

BOWIE STATE UNIVERSITY, part of the University System of Maryland
Defendant – Appellee

Appeal from the United States District Court for the District of Maryland at Greenbelt

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In accordance with the written opinion of this Court filed this day, the Court affirms in part and vacates in part the judgment of the District Court. This case is remanded to the District Court for further proceedings consistent with the Court's opinion.

A certified copy of this judgment will be provided to the District Court upon issuance of this mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

_____

CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 6, 2006

No. 05-1760
CA-04-1984-RWT

LAWRENCE K. SILVA, Ph.D.
Plaintiff – Appellant

v.

BOWIE STATE UNIVERSITY, part of the University System of Maryland
Defendant – Appellee

MANDATE

The judgment of this Court, entered 2/10/06, takes effect this date.

A certified copy of this Court's judgment and a copy of its decision are issued to the district court and constitute the mandate of this Court.

/s/ Patricia S. Connor

CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 05-1760

LAWRENCE K. SILVA, Ph.D.
Plaintiff – Appellant

v.

BOWIE STATE UNIVERSITY, part of the University System of Maryland
Defendant – Appellee

Appeal from the United States District Court of the District of Maryland, at Greenbelt. Roger W. Titus, District Judge. (CA-04-1984-RWT)

Submitted: January 25, 2006
Decided: February 10, 2006

Before WILLIAMS, TRAXLER, and KING, Circuit Judges.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

Lawrence K. Silva, Appellant Pro Se. Sara Slaff, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Lawrence K. Silva filed a second amended complaint against Bowie State University ("BSU"), his former employer, alleging that BSU terminated him in retaliation for engaging in protected activity, in violation of Title VII of the Civil Rights Act of 1964, as amended. BSU moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief may be granted. The district court concluded that it need not convert the motion to dismiss to a motion for summary judgment under Fed. R. Civ. P. 56. The court then granted BSU's Rule 12(b)(6) motion, finding that, as a matter of law, BSU's request for Silva to undergo a medical examination was not an adverse employment action. The court also concluded that Silva failed to state a prima facie case of retaliatory discharge, finding that there was no causal connection between his protected activity and the termination because BSU terminated him for refusing to undergo the medical evaluation—not for filing his discrimination complaint. Silva appeals. We affirm in part, vacate in part, and remand for further proceedings.

Silva asserts on appeal that the district court erred by failing to convert the motion to dismiss into a motion for summary judgment and that the court erred by finding that the request for a medical examination was not an adverse employment action. We have reviewed the record and find no reversible error relating to these issues. Accordingly, we affirm these portions of the district court's order for the reasons stated by the court at the hearing held on June 21, 2005. See Silva v. Bowie State Univ., No. CA-04-1984-RWT (D. Md. June 22, 2005).

Next, Silva asserts that district court erred granting BSU's motion to dismiss his retaliatory discharge claim on the grounds that there was no casual connection between the filing of his complaint with BSU's Equal Employment Opportunity ("EEO") officer and the termination and that insubordination was the reason for his termination. We review de novo a Rule 12(b)(6) dismissal, "accept[ing] as true the factual allegations in the light most favorable to the plaintiff." Lambeth v. Bd. Of Comm'rs, 407 F.3d 266, 268 (4th Cir. 2005) (citations omitted). "[A] district court may dismiss a complaint for failure to state a claim only if it appears beyond doubt that the plaintiff can prove not set of facts that would entitle him to relief." Id.

To state a prima facie case of retaliation, Silva must show that (1) he engaged in a protected activity; (2) an adverse employment action was taken against him; and (3) there was a casual connection between the first two elements. Price v. Thompson, 380 F.3d 209, 212 (4th Cir. 2004). In determining whether there is a casual connection between the protected activity and the adverse employment action sufficient to state a prima facie case of retaliation, we have "held that a causal connection ... exists where the employer takes an adverse employment action against an employee shortly after learning of the protected activity." Id. at 213.

Here, Silva contacted the EEO officer on January 26, 2003. BSU terminated him on April 8, 2003—about ten weeks later. Because "[t]he burden of establishing a prima facie case . . . is not onerous," Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981), we find that the ten-week lapse of time sufficiently established a prima facie case of retaliation. See King v. Rumsfeld, 328 F.3d 145, 151 & n.5 (4th Cir. 2003)(concluding

that ten weeks between protected activity and adverse employment action "gives rise to sufficient inference of causation to satisfy the prima facie requirement" but noting that "[t]his length of time . . . is sufficiently long so as to weaken significantly the inference of causation between the two events"). Thus, the district court erred in granting BSU's motion to dismiss Silva's retaliatory discharge claim.

Accordingly, we vacate that portion of the district court's order and remand for further proceedings. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED IN PART
VACATED IN PART
AND REMANDED

Case No. 07-1101
Silva v. Bowie State Univ.
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
Re: 07-1101 Silva v. Bowie State University
APPELLANT'S INFORMAL BRIEF

1. Jurisdiction (for appellants only)

a. What is the name of the court from which you are appealing? United States District Court for the District of Maryland (Southern Division)

b. What is the date(s) of the order or orders which you are appealing? January 24, 2007 (Decision on which the order is based appears in January 22, 2007 hearing transcript at pp. 30-45, attached)

2. Timeliness of appeal (for prisoners only)

When did you give your notice of appeal to a prison officer for mailing to the United States District Court? Enter the exact date:

Not applicable.

3. Issues on Appeal

Use the following spaces to tell the United States Court of Appeals for the Foruth Circuit why the judgment under review should be affirmed, reversed, or vacated and remanded. Appellants must provide a brief summary of the facts and arguments that support their position that the judgment under review was wrong. Appellees may rely on the facts and law stated in that judgment or may advance alternative grounds for affirmance or dismissal. The parties may cite case law, but it is not required.

Supporting Facts: Appellant is a U.S. citizen of African descent (Nigeria). His ethnic background is Yoruba (a tribe in the western part of Nigeria). His religious affiliation is Southern Baptist. Appellant is 57 years of age. In 2001, Appellant filed an EEO claim against Bowie State University as part of a settlement agreement arising from this prior EEO complaint. The parties executed a settlement agreement and written employment contract. Both agreements provided, among other things, that Appellant would not be required to submit to an independent medical examination. (Copy of agreements attached). Appellant returned to work and complied fully with the terms of agreements, fulfilling his obligations as a tenured associate professor.

When Appellant was again subjected to harassment and a hostile environment, he filed a second EEO complaint with the University's EEO office. Upon reviewing Appellant's EEO claim, Appellee demanded that Appellant submit to an independent medical examination. The imposition of this requirement expressly contravened the terms of the settlement agreement and Appellant's employment contract with the University. Therefore, Appellant refused to submit to the IME. Appellee then terminated Appellant on April 8, 2003.

Appellant timely filed the instant claim with the Maryland Commission for Human Relations. Upon receipt of his Notice of Right to Suit, Appellant filed the instant claim in the Circuit Court for Prince George's County, Maryland. Appellee removed the action to the United States District Court for the District of Maryland. On or about

May 16, 2005, Appellant filed his Second Amended Complaint. Soon thereafter, Appellee filed its Motion to Dismiss. A hearing on Appellee's Motion to Dismiss was held on June 21, 2005 before Judge Roger Titus. At the conclusion of the hearing, Judge Titus granted Appellee's Motion to Dismiss, accepting Appellee's argument that (1) requiring Appellant to undergo an IME did not constitute an adverse employment action and that (2) Appellant's termination was not casually connected to his EEO claim but to his refusal to undergo the IME.

Appellant timely filed his notice of appeal, which was docketed before this court as 05-1760. This Court affirmed in part, vacated in part, and remanded the matter for further proceedings. Specifically, this Court found that the District Court had erred in granting the University's motion to dismiss Appellant's retaliatory discharge claim, stating that the 10-week lapse of time sufficiently established a prima facie case of retaliation. The Court then remanded for further proceedings as to whether a casual connection existed between the termination and Appellant's prior EEO activity.

On remand, the parties did not reopen discovery. Appellee filed a Motion for Summary Judgment. A hearing on Appellee's Motion for Summary Judgment was held on January 22, 2007 before Judge Roger Titus. At the conclusion of the hearing, Judge Titus granted Appellee's Motion for Summary Judgment, accepting Appellee's argument that the adverse employment action – the termination – was not casually connected to his EEO claim but to his refusal to undergo the IME.

Appellant timely filed his notice of appeal and is again before this Court.

Issue 1

The District Court erred in finding no relationship between Appellant's filing of an EEO complaint and the termination decision. Specifically, the District Court erred in finding that the request for the IME was justified based on the content of Appellant's EEO complaint. Appellant has an absolute right to participate in the EEO process and file a claim where he believes he has been wronged; no matter what the merits of the claim may be determined, there can be not retaliation for filing it. *See Childress v. City of Richmond,* 120 F.2d 476 (4th Cir. 1997). There was sufficient evidence in the record that Appellant understood there would be no further IME demands. (Docket Entry 62, Exhibit A, Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, Affidavit of Lawrence Silva). This was not a vague allegation by Appellant. The demand for the IME was a material breach of the settlement agreement as in Appellant's prior EEO activity. The elimination of the IME as a condition of reemployment was clear. (See attached correspondence from Miller and Obayashi Mediation, LLC who assisted in reaching first settlement agreement from prior EEO claim.) The deposition testimony submitted by Appellee in support of its motion also corroborates Appellant's belief that the IME would only be used to justify another termination, as it had been used before. *See* Docket Entry 58, Exhibit C, Deposition testimony of Lawrence Silva, at 42-43; *see also* attached IME reports used to justify Ap-

pellant's prior termination; 6/10/99 memorandum from Dr. Henry Raymond about use of IME to justify termination. Therefore, there was sufficient evidence, if viewed in the light most favorable to the non-moving party, to rebut the University's purported nondiscriminatory reason for the termination. The evidence was sufficient to show a dispute as to a material fact which should have been left for the jury to decide.

Issue 2

The District Court erred in finding that there was no indication that the Appellant's prior EEO complaints were of a similar nature. Specifically, in addition to Appellant's affidavit submitted in opposition to the motion for summary judgment, Appellee submitted deposition testimony that showed the similarity in the two EEO claims of harassment and violation of civil rights. *See* Docket Entry 58, Exhibit C, Deposition testimony of Lawrence Silva, at 43. The evidence was sufficient to show a dispute as a material fact, giving rise to an inference that the Appellee's reason for termination was mere pretext for retaliation.

4. Relief Requested

What do you want the Court of Appeals to do? Identify exactly the relief you seek.

Appellant requests that the Court of Appeals vacate the order granting Appellee's Motion for Summary Judgment and remand this matter to the District Court for further proceedings.

5. Prior Appeals (for appellants only)

a. Have you filed other appeals in this court?

___x___ Yes _____ No

b. If you checked YES, what are the case names and docket numbers for those appeals and what was the ultimate disposition of each?

___05-1760___

_____

Signature

[Notarization not Required]

_____

[Please Print Your Name Here]

CERTIFICATE OF SERVICE

You must serve your papers on appeal to all persons served in the lower court case and complete the following certification:

I certify that on 2/23/07 I mailed a complete copy of this Informal Brief and all attachments to all parties, addressed as shown below.

Sara Slaff, Esq.
Office of the Attorney General of Maryland
200 St. Paul Place
17th Floor
Baltimore, MD 21202

_____

Signature
[Notarization Not Required]

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT and Release ("the Agreement") is made and entered into as of this 23rd day of April, 2002, by and between Lawrence K. Silva ("Silva") and Bowie State University ("BSU"), the Board of Regents of the University System of Maryland, Dr. Calvin W. Lowe ("Lowe"), in his official capacity as President of Bowie State University and in his individual capacity, Dr. George E. Miller, III and Dr. Henry Raymond (collectively referred to as "BSU Defendants"). Silva and BSU Defendants intend to be legally bound by this Agreement.

WHEREAS, Silva has raised potential claims against the BSU Defendants in relation to his employment at BSU, and the duration of that employment (hereafter referred to as the "Action"); and

WHEREAS, Silva and the BSU Defendants wish to resolve and settle all claims heretofore raise between Silva and the BSU Defendants without further claims or litigation,

WHEREAS, Silva has read and reviewed this Agreement personally and has had an opportunity to review and discuss it with legal counsel of his choosing; Silva enters in to this Agreement freely and voluntarily, without duress, and is fully aware of its meaning and consequences; and Silva intends to be legally bound by this Agreement.

NOW, THEREFORE, in consideration of the promises and mutual covenants contained herein, Silva and the BSU Defendants agree as follows:

1. **Employment:** BSU will employ Silva as an Associate Professor in the Physical Education Department of BSU commencing in the Summer Session of 2002. Silva's salary will be $64,789.00,

which reflects the 2.5% Cost of Living Increase (COLA) of July 2001 and the 4% COLA received on January 1, 2002. s a continuous tenured faculty member, Silva will be entitled to all the benefits of the position which includes tuition remission as set forth in UMS Policies on Tuition Remission, UMS VII-4.20 *et seq.* Silva will be subject to the policies and procedures of BSU and the University System of Maryland (UMS). In Calculating Silva's retirement, he will be credited for the years of previous State service, i.e. 1990-2001. Silva will receive a letter signed by the BSU Defendants welcoming him back upon his commencement of re-employment with the University. A copy of this letter will be forwarded to counsel.

(a) **Expungement of Negative Records:** The University will expunge any and all negative records and in particular the records created from 1997-2001 relating to the case filed in Prince George's County Circuit Court, Case no. CAL 01-15155, from Silva's personnel file.

(b) **Full Professor Eligibility:** Silva will be eligible and will be considered for full professor status in the next cycle of consideration after he returns to work. Once a specific date has been set, Silva will be duly notified. This consideration will be in accordance with the BSU Appointment, Rank, and Tenure Policies and will not be affected by the filing of this lawsuit or Silva's voluntary separation from BSU form January 2001 through June 2002.

2. **Monetary Settlement:** In return for the dismissal of this action, Silva shall receive the sum of Twenty-Nine Thousand, Nine Hundred, Ninety-

Nine Dollars and Ninety-Nine Cents ($29,999.99). Payment of the settlement will be made no later than June 17, 2002.

3. **Release:** Silva hereby releases, acquires, and forever discharges Bowie State University, the Board of Regents of the University System of Maryland, Dr. Calvin W. Lowe, Dr. George E. Miller, III, Dr. Henry Raymond and their current, former, and future officers, employees, agents, servants, principals, heirs, executors, administrators, predecessors, successors, and privies, including but not limited to the BSU Defendants, in their individual and official capacities, and all other persons, firms, corporations, boards, commissions, agencies, and other legal entities of whatever description, whether suable or not (hereinafter collectively and individually referred to as the "Released Parties"), from all demands of whatever nature, actions and causes of action, appeals, obligations, liabilities, promises, agreements, controversies, suits, rights, charges, damages, punitive damages, costs, loss of education and/or employment opportunities, attorneys' fees, costs of litigations, humiliation, embarrassment, mental anguish, injury to reputations, compensation on account of personal injuries, and any other legal, equitable, or administrative relief of any kind, known or suspected, as a result of or relating in any manner to the employment of Silva at BSU, or as a result of or relating in any manner to any acts or omissions by the Released Parties since January 1, 1997 up until the execution of this agreement (hereafter referred to as "Released Claims"). These Released Claims include, but are not limited to, any and all claims filed by Silva pur-

suant to the Maryland Tort Claims Act, MD Code Ann. State Govt. Art. §12-101 *et seq.*, and relating to this action to the extent such claims relate to or concern the actions filed by Silva in Prince George's County Court, Case No. CAL 01-15155.

(a) **Filing of Notice of Dismissal.** Upon execution of this Agreement, Silva will file a Notice of Dismissal Without Prejudice in the Circuit Court of Prince George's County. Upon proof of payment of $29,999.99 by BSU Defendants no later than June 17, 2002, Silva will file a Notice of Dismissal With Prejudice in the Circuit Court of Prince George's County. A copy of this Notice will be faxed to Defendants' Counsel.

4. **Compromise:** Silva and the BSU Defendants acknowledge and agree that this Agreement is entered into in order to resolve disputed claims and to resolve in a fair and amicable manner all disputes between them, and that nothing contained herein or the performance by BSU of the promises and conditions contained herein shall be construed as admission of liability or improper conduct on the part of BSU and the Released Parties. Each side shall bear all its own costs and attorney's fees. BSU Defendants assure their compliance with the terms set forth in this Agreement.

5. **Entire Agreement:** Silva and the BSU Defendants further agree that this Agreement contains the entire agreement between the parties, that its terms are contractual and not a mere recital, and Silva represents and acknowledges that in executing this Agreement he does not rely and has not relied upon any representation or statement not set forth or described herein that

may have been made by any of the Released Parties or by any of their agents, representatives, or attorneys with regard to the subject matter, basis, or effect of this Agreement or otherwise.

6. **Successors:** This Agreement shall be binding on and inure to the benefit of the parties hereto and their respective legal representatives, successors, and assigns.

7. **Choice of Law:** This Agreement shall be construed in accordance with the laws of the State of Maryland.

8. **Modification:** No modification of this Agreement shall be effective unless it is in writing and signed by Silva and BSU.

In witness whereof, the parties hereto have executed this Agreement as of this 23rd day of April, 2002.

SIGNATURE PAGE FOLLOWS

WITNESSES:

_____ /s/
Lawrence K. Silva
4/23/02
Date

BOWIE STATE UNIVERSITY

_____ By: /s/
Dr. Calvin W. Lowe, President
4/23/02
Date

August 1, 2002

Dr. Lawrence Silva

Below are the classes you will be teaching for the Fall 2002 Semester:

HEALTH – HEED 102 LIFE AND HEALTH

101	3 hrs	Mon.	6:00 – 8:30 PM
102	3 hrs	Wed.	6:00 – 8:30 PM

PHYSICAL EDUCATION PHED 141 – WEIGHT TRAINING

001	1hr	MW	3:00 – 3:50 PM
002	1 hr	MW	4:00 – 4:50 PM

FIRST AID, CPR, SAFETY – PHED 210

001	3 hrs	T	9:00-11:30 AM

Miller and Obayashi Mediation, LLC

April 15, 2002

Dear Dr. Silva, Anne, and Sara:

I am sending a faxed copy of the new Settlement Agreement. This agreement seeks to allow Dr. Silva and the University to resume their relationship while putting their disputes behind them once and for all.

Dr. Lowe has agreed to eliminate the need for a psychological exam as part of this agreement in the belief that Dr. Silva truly wants to return to Bowie State. This is a gesture of mutual trust, respect, and desire to resume their professional relationship. He has asked that Dr. Silva have the opportunity to go over the proposed agreement with his attorney and, provided he is satisfied with the terms, to meet with him to finalize the agreement in a private meeting together. There would be no attorneys, mediators, or other representatives present. Dr. Lowe wants to welcome Dr. Silva back, and ensure that he and Dr. Silva have a good working relationship. An appointment can be made through his secretary, Mary Royster, at 301-860-3502. He is available anytime except Wednesday. Sara will be glad to help arrange a meeting time if you prefer.

The Settlement Agreement provides, according to Dr. Silva's request, for language that ensures that he will be treated as a regular faculty without any stigma from the past. It further provides for expungement of any negative records from his personnel file.

A specific provision is included for Dr. Silva's eligibility to achieve full professor status, yet, since there is no date set, the University has agreed to notify Dr. Silva as soon as a date is known.

As to Dr. Silva's request for compensation for his children's tuition, this was an early-negotiated point

when Sara was exploring ways to get more cash to settle the case. My notes indicate that it was last discussed in terms of making his children eligible for the tuition benefit as soon as he starts work, which, in fact, they will be. Dr. Lowe wants Dr. Silva to return to work as soon as it is practicable. The 30,000 cash is the total amount of new money that Dr. Silva will receive under this agreement.

Please keep in mind that it is extremely rare in such a case to have a result whereby Dr. Silva is invited make to work for the University. Dr. Lowe stands behind this positive solution, and hopes that Dr. Silva feels the same way.

Please consider this offer and respond with any comments to help complete the settlement agreement. If there are any further issues, I ask that you approach them in the spirit of collaboration and cooperation.

Dan

Dr. Lawrence K. Silva, Associate Professor
Department of Teaching, Learning & Professional Development
Bowie State University, Bowie, MD 20715

Sheila Hobson
Senior Director of Human Resources
Bowie State University, Bowie, MD 20715

Dr. Ms. Sheila:

Thank you for your two letters in fulfillment of the settlement agreement. There are still a number of misrepresentations in your communications. I would like them corrected before I come to your office to examine my personnel record.

The settlement agreement states inter alia:

1. That BSU will employ me as an Associate Professor in the Physical Education Department and not Assistant Professor as you addressed me.

2. That my employment status is Continuous tenured faculty.

3. That in calculating my retirement, I will be credited for the years of previous state service, that is 1990-2001.

4. That I will receive a letter signed by the BSU defendants welcoming me back upon my commencement of reemployment with the university. I had met with the President. That is okay with me.

5. That all negative records, in particular those created from 1197-2001 [sic] be expunged from my personnel file.

6. That I will be entitled to all benefits of the position, which include remission as set forth in the UMS Policies on tuition remission. As of Janu-

ary 24th, 2003, my son's tuition remission for last semester has not been sent. The HOD promised to fax that immediately.

7. That I will be eligible and will be considered for full Professor status in the next cycle of consideration (that is this year). It is expected that I be notified of the appropriate time.

These are, what can be gleaned from the settlement agreement we arrived at. Perhaps a copy of the settlement agreement should be in my personnel file. I will be willing to examine my personnel record when items 1-5 are incorporated into my personnel file.

Sincerely,
Lawrence K. Silva

CC: Dr. Calvin Lowe, President
Dr. George Miller III, Provost
Dr. Vernon Polite, Dean, School of Education
Dr. Lola Lacounte, HOD, Dept of TLPD
Sara Slaff, Office of the Attorney General

Bowie State University
Office of Human Resources

MEMORANDUM

TO: Dr. Lawrence Silva
Assistant Professor

FROM: Sheila Hobson, Senior Director of Human Resources

DATE: March 17, 2003

SUBJECT: Independent Medical Examination

Based on information you provided to Glenn Isaac, Equal Employment Opportunity Officer, in the course of his investigation or your EEO complaint, I have decided that an Independent Medical Examination is necessary. In making this decision, I have consulted with Dr. George Miller, Provost.

You are, therefore, scheduled to meet with Dr. Hung Cheung at 9:15 a.m. on Friday, March 14, 2003 at 1419 Knecht Avenue, Baltimore, Maryland. Please make arrangements to meet with the doctor.

Thanks for your attention to the matter.

Cc: Dr. George E. Miller, III Provost
Dr. Vernon Polite, Dean of the
School of Education
Dr. John Organ, Professor, Physical Education
Glenn Isaac, Equal Employment
Opportunity Officer

100

No. 07-1270

FILED
JUL 21 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LAWRENCE K. SILVA,
Petitioner,

v.

BOWIE STATE UNIVERSITY,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DOUGLAS F. GANSLER
Attorney General of Maryland

STEVEN M. SULLIVAN*
KATHLEEN E. WHERTHEY
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Office of the Attorney General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6324

Attorneys for Respondent

*Counsel of Record

QUESTION PRESENTED

Did the court of appeals properly affirm the entry of summary judgment against a former university employee on his claim of retaliation under Title VII, when undisputed evidence established that the university terminated him for cause, without pretext, for refusing to have an independent medical examination to establish his fitness for continued employment and to protect the campus community, after he made unsubstantiated allegations of an extensive conspiracy and electronic surveillance campaign against him by myriad faculty, students, and contractors of the university?

PARTIES TO THE PROCEEDING

Petitioner Lawrence K. Silva's initial complaint named Bowie State University (the "University") and its Provost, George Miller, as Defendants. Silva's final pleading, his Second Amended Complaint, named only the University as Defendant.

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OPINIONS BELOW

The United States District Court for the District of Maryland issued its June 22, 2005 opinion dismissing Silva's second amended complaint orally, from the bench, and it is unreported. The February 10, 2006 per curiam Opinion of the United States Court of Appeals for the Fourth Circuit, affirming that judgment in part and vacating it in part, is unreported. App. 10a-13a. On remand, the district court issued its January 22, 2007 opinion granting summary judgment against Silva orally, from the bench, and a transcript of the hearing and ruling is reproduced in the Respondent's Appendix. R. App. 3-41. The August 2, 2007, per curiam decision of the court of appeals affirming that decision is unreported. App. 4a-5a.

STATEMENT OF THE CASE

Petitioner Lawrence K. Silva is a former associate professor in the Physical Education Department of Bowie State University (the "University") in Maryland. Pet. at 2; App. 22a. He is an American citizen of Nigerian descent. Pet. at 2. In 2001 he filed an Equal Employment Opportunity ("EEO") grievance against the University, which the parties settled the following year by written agreement. Pet. at 15a.; App. 22a-27a; R. App. 36.

On January 26, 2003, Silva filed a second EEO claim. App. 12a; R. App. 31-32, 42. Silva's admittedly "unusual complaints" were that myriad members of the University community were conspiring to violate his rights, monitoring his movements, and disrupting his classes, by means including the use of electronic devices such as cellular telephones and scanners. R. App. 5, 8-9, 12-14, 24-26, 32-34, 43. The alleged perpetrators included numerous University faculty members, coaches, personnel, students, and campus police officers. Id. Cleaning workers, drivers working for a construction

contractor, and the commandant and cadets of the University's Army Reserve Officer Training Corps were other purported conspirators. Id. Silva aired his suspicions with various members of the University community, including a female athlete, whom he accused of using her cell phone as a tracking device. R. App. 9.

The EEO investigator found no evidence supporting Silva's allegations, and had concerns about Silva's mental stability and its potential effect on the safety and well-being of the campus community. R. App. 12-14, 22-23, 33, 42-44. Consequently, the investigator forwarded the information he had received to the University's Senior Human Resources Director, and the University instructed Silva to undergo an independent medical examination ("IME"). App. 33a; R. App. 33-34, 44. Silva admittedly ignored that directive and refused to have an IME; therefore, on April 8, 2003, the University terminated his employment for cause. App. 12a; R. App. 33-34.

After his termination, Silva filed a complaint in the Circuit Court for Prince George's County, Maryland, against the University and its Provost, asserting claims of discrimination, retaliation, and breach of contract under state law. R. App. 28-29. Silva subsequently amended his complaint to add one count alleging national origin and age discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, whereupon the University removed the action to the United States District Court for the District of Maryland. Id. On May 16, 2005, Silva filed a second amended complaint asserting a single count, against the University alone, alleging retaliation in violation of Title VII, specifically 42 U.S.C. §2000e-3(a).

Following a hearing on June 21, 2005, the district court dismissed Silva's second amended complaint. R. App. 29. The court held that the

University's request that Silva have an IME was not an adverse employment action. App. 11a; R. App. 5. The court also concluded that Silva had failed to state a prima facie case of retaliatory discharge. App. 11a.

On February 10, 2006, the United States Court of Appeals for the Fourth Circuit affirmed in part, vacated in part, and remanded for further proceedings. App. 8a, 11a-13a; R. App. 29. The court of appeals affirmed that the University's request for Silva to complete an IME was not an adverse employment action. App. 8a, 11a; R. App. 5, 29-30. Nevertheless, the court concluded that Silva had sufficiently alleged the elements of a prima facie case of retaliation, specifically: (1) engaging in a protected activity; (2) suffering an adverse employment action, namely termination; and (3) a causal connection between the first two elements. App. 12a-13a (citing Price v. Thompson, 380 F.3d 209, 212 (4th Cir. 2004)); see also King v. Rumsfeld, 328 F.3d 145, 151 (4th Cir. 2003), cert. denied, 540 U.S. 1073 (2003). The court explained that Silva had met the "not onerous" burden of stating a prima facie case, because the ten-week time period between his second EEO complaint and his termination was sufficiently short to create an inference, albeit a significantly "weaken[ed]" one, of causal connection between the two. App. 12a-13a (citing Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); King, 328 F.3d at 151 & n.5).

On remand, the University filed a motion for summary judgment, to which the district court applied the burden-shifting analysis this Court established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). R. App. 17-20, 38-41. Under that analysis, once an employee states a prima facie case of discrimination, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas, 411 U.S. at 802.

The district court held the University met its

burden by showing that it terminated Silva not for filing his second EEO complaint, but instead for refusing an IME. App. 16a; R. App. 38-39. That conclusion squared with record evidence appended to the University's motion, and referenced at the hearing, including affidavits from the investigating EEO officer and the University's Senior Director of Human Resources, correspondence from the University to Silva, and Silva's own EEO complaint and deposition testimony. R. App. 5, 8, 18, 20, 31-34.

Once the University met its burden by explaining its non-discriminatory reason for terminating Silva, he failed to meet his consequent burden to "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Burdine, 450 U.S. at 253; see also McDonnell, 411 U.S. at 804. Silva's only evidence of pretext was his own affidavit asserting his subjective belief that the settlement of his prior EEO claim against the University exempted him from requests for an IME. R. App. 10, 15-16. Silva's affidavit directly contradicted the written settlement agreement he signed, which was silent concerning future IMEs and, by its express terms, contained his entire agreement with the University. R. App. 15-17, 23, 35-36; App. 25a-26a. Thus, after reviewing the agreement, the court concluded that, "notwithstanding the forgiving summary judgment standard, I cannot read into this agreement terms that are not there." R. App. 35; see also R. App. 10-11. Furthermore, the University confirmed that it did not in Silva's case, and would not on principle, agree to forego future requests for IMEs, given the important purpose of such examinations "to establish fitness for work and to protect the safety and well-being of the campus community." R. App. 4-5; see also R. App. 28. Silva argued that his successive EEO complaints were sufficiently similar that the IME

request was a "setup" that the University knew he would refuse. R. App. 22-23. However, Silva's counsel conceded there was "no document" before the court, and no evidence appended to Silva's response to the University's motion, to support that theory. R. App. 22-23, 26-27.

Concluding that the University had met its burden under McDonnell Douglas, and Silva had not, the district court granted the University summary judgment. App. 5a; R. App. 1-2, 34-41. The court of appeals affirmed, in an unpublished, one-paragraph, per curiam opinion issued on August 2, 2007, and denied Silva's subsequent petition for rehearing en banc. App. 3a-6a.

REASONS FOR DENYING THE WRIT

THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The unpublished decisions below are fact-bound determinations that conform with prior decisions of this Court and involve no error that would justify the exercise of this Court's discretionary jurisdiction. Petitioner complains only of allegedly erroneous findings "that the request for an IME was justified," and "that there was no indication that Petitioner's prior EEO complaints were of a similar nature" so as to support an inference of pretextual termination. Pet. at ii. Regardless of whether the charged errors concern purely factual findings, or alleged misapplication of the rule of law established in McDonnell Douglas and its progeny to the facts of this case, further review is not warranted. Sup. Ct. R. 10.

Silva does not, and cannot, maintain that the court of appeals' decision conflicts with that of any other federal court of appeals, so as to warrant this Court's review. See Sup. Ct. R. 10(a). The only decision Silva cites from any federal appellate court

other than the Fourth Circuit, Wyatt v. Boston, 35 F.3d 13 (1st Cir. 1994), is in harmony with Fourth Circuit precedent. Silva cites Wyatt for the proposition that "an employee is liable for retaliating against an individual for filing an EEO charge regardless of the validity or reasonableness of the charge." Pet at 4; see also id. at 6. That principle applies in the Fourth Circuit as well. See EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 406 (4th Cir. 2005)("We have recognized that [42 U.S.C. § 2000e-3(a)] protects activity in opposition not only to employment actions actually unlawful under Title VII but also employment actions an employee reasonably believes to be unlawful."), cert. denied, 547 U.S. 1041 (2006). That principle does not apply to this case, however, where the undisputed facts established that the University terminated Silva not for filing an EEO claim, but for refusing a justifiably requested IME.

Silva also does not, and cannot, claim that the circuit court's brief unreported opinion determined an important question of federal law that this Court either has not previously decided, or has previously decided in a conflicting way. See S. Ct. R. 10(c). On the contrary, the district court properly applied the well-established McDonnell Douglas burden-shifting analysis, as the circuit court subsequently affirmed.

Finally, even if Petitioner had raised any noteworthy legal question concerning retaliatory discharge, this case would be a poor vehicle for deciding it, because the record so clearly fails to support a claim of retaliation. From undisputed record evidence, the district court concluded, and the circuit court affirmed, that "[t]here is no relationship between [Silva's] filing of the [EEO] complaint and the termination decision." App. 5a; R. App. 38. Instead, Silva's termination resulted from "his refusal to take an IME that was reasonably requested as a result of delusional allegations made in connection

with his EEOC complaint." Id. The record contained no evidence to support a contrary conclusion, even "under the forgiving summary judgment standard, with all inferences in favor of the nonmoving party, that these reasons of the employer were not its true reasons but were really a pretext for discrimination." App. 5a; R. App. 40. Because, under these circumstances, revisiting the lower courts' well-supported determinations is highly unlikely to alter the outcome of the case, further review is unnecessary and undesirable.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland

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Attorneys for Respondents

July 21, 2008

*Counsel of Record

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND SOUTHERN DIVISION

LAWRENCE K. SILVA,	)	
Plaintiff	)	
v.	)	Civil Action No.
BOWIE STATE UNIVERSITY,	)	RWT 04-cv-1984
Defendant	)	

ORDER

(Filed Jan. 24, 2007)

Upon consideration of the Defendant's Motion for Summary Judgment [Paper No. 58], the responses in opposition thereto, the arguments of counsel at a hearing before the undersigned on January 22, 2007, and for the reasons stated on the record, it is this 23rd day of January, 2007, by the United States District Court for the District of Maryland,

ORDERED, that the Defendant's Motion for Summary Judgment [Paper No. 58] is hereby GRANTED; and it is further

ORDERED, that judgment for costs is entered in favor of the Defendant; and it is further

ORDERED, that the Clerk of the Court is directed to close the case.

/s/
ROGER W. TITUS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
OF MARYLAND SOUTHERN DIVISION

LAWRENCE K. SILVA, Plaintiff	:	
vs	:	Civil Action: RWT-04-1984
BOWIE STATE UNIVERSITY, Defendants.	:	

Monday, January 22, 2007
Greenbelt, Maryland

The above-entitled action came on for a Motions Hearing Proceeding before the HONORABLE ROGER W. TITUS, united States District Judge, in courtroom 2A, commencing at 3:31 p.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE TESTIMONY PROCEEDINGS AS RECORDED AND REQUESTED.

APPEARANCES:

On behalf of the Plaintiff:

LISA SMITH SANDERS, Esquire
On behalf of the Defendant:
SARA SLAFF, Esquire

Tracy Rae Dunlap, RPR, CRR (301) 344-3912
Official Court Reporter

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[3] THE CLERK: The matter now pending before this court is RWT-04-1984; Lawrence K. Silva versus Bowie State University.

Counsel, would you please identify yourselves for the record?

MS. SANDERS: Lisa Smith Sanders on behalf of the plaintiff, Dr. Silva.

MS. SLAFF: Sara Slaff on behalf of the defendant, Bowie State University.

THE COURT: I will be glad to hear from you.

MS. SLAFF: Your Honor, we are here on the plaintiff's motion for a Title 7 retaliation claim, and the issue before you is whether plaintiff has established whether his refusal to undergo an independent medical examination, which I will refer to as an IME, which resulted in his termination, was pretext for retaliatory discrimination under Title 7, and the answer established by the evidence is clearly no.

The court has acknowledged that the university has a right to request independent medical examinations of its employees to establish fitness for work

and to protect the safety and well-being of the campus community. This court has also held that the university's request for an IME was not an adverse [4] employment action. That decision was upheld by the Fourth Circuit.

It stands to reason that the mere request to undergo an IME is not materially adverse to a reasonable employee to the point that it could well dissuade a reasonable worker from making or supporting a charge of discrimination. Here, the "action" is simply a request to undergo an independent medical examination to ensure mental fitness based on extensive and unusual lists of individuals purportedly monitoring plaintiff's movements, including the R.O.T.C., construction workers working at the university, and numerous university personnel.

Had this list been presented to any other administrator at the university, they would have referred it to Human Resources and an IME would have been requested as occurred in this case. There was no nexus established by the evidence presented between plaintiff's EEO claim, which was dismissed, and his ultimate termination.

Further, Your Honor, plaintiff's attempt to show pretext is without merit. The university routinely requests IMEs, as set forth in the affidavit of Senior Human Resource Director Sheila Hobson. Plaintiff had undergone IMEs in the past and just [5] chose to ignore this one, resulting in his termination. This time line in no way establishes pretext.

Moreover, to the extent plaintiff's claim is whether the university may terminate an employee for his failure to undergo an IME, this is a tort for wrongful termination, or perhaps a breach of contract claim. It is not a Title 7 retaliation claim. As the Fourth Circuit recognized in granting this limited remand, a ten-week time from the filing of the EEO complaint to the termination is, "sufficiently long to weaken significantly the inference of causation between the two events" citing the King case at 151, Note 5.

Plaintiff has not and cannot establish any nexus between the filing of the EEO complaint and his termination.

THE COURT: He can show a nexus between the filing of his EEOC complaint and the request for the IME; correct?

MS. SLAFF: Correct. I mean, the information that the university used to base the decision to undergo the IME was provided in the course of the filing of the EEO claim. So, that is correct. But defendant's reasonable, nondiscriminatory basis for [6] the termination – plaintiff's refusal to undergo the IME was the basis for the termination, and not retaliation.

THE COURT: All right.

Ms. Sanders?

MS. SANDERS: Thank you, Your Honor.

Counsel is correct that this was remanded from the Fourth Circuit on a fairly narrow issue regarding Dr. Silva's retaliation claim, mainly the demand that he take an IME after the filing of the EEO claim in 2003. I do believe that the university, however, is mistaken in saying that this is not – there has not been a showing of adverse employment action here or that it was not materially adverse to a reasonable employee.

Look at whether it is materially adverse to a reasonable employee standing in Dr. Silva's shoes at the time this demand was made on him to take an IME in 2003. You would have to know the history behind his return to work at that time. He had just returned to work in 2002 following a prior EEO claim, where he was also terminated, in which the IME had specifically been used as a basis for his termination. Therefore, our position would be that a reasonable employee would think, if I take an IME again, they're going to fire [7] me, despite the fact we had just reached a settlement agreement that all this past history was going to be expunged from the record.

In addition, the university has acknowledged that yes, in fact, their basis for requesting the IME was triggered by Dr. Silva's filing. There is no reason to believe that that trigger was justified. I don't believe that the university has actually shown that they had a reasonable basis to believe they needed to demand the IME, other than –

THE COURT: He was making some very strange allegations in his complaint about people running around with cell phones and tracking him, and contractors for the university following him and – I mean, it was really kind of strange, wasn't it?

MS. SANDERS: I would just posit that I believe the actual content of the claim may not really justify the degree to which they asked for the independent exam. Further, the – in the prior action – in the action from 2000-2001, Dr. Silva had made a similar claim and had submitted to the IME, and that physician, who was the university's physician, did in fact state that yes, it's a little odd that he believes this, but he is no harm to himself or anyone else because of this belief. So, I do not believe [8] that the university has shown that there was a reasonable belief on their part that Dr. Silva was a danger to himself or someone else.

THE COURT: Was he making the identical type of allegations to a prior matter that was settled or not?

MS. SANDERS: The prior matter – I don't have the actual complaint right in front of me, or the EEO claim from that matter, but my recollection is that it was a very similar allegation.

THE COURT: Well, you've got here a series of allegations made by him in connection with his discrimination complaint. Those include that drivers from a construction company were monitoring his movements and violating his rights, that people

working for a cleaning company were violating his civil rights and monitoring his movements, that R.O.T.C. cadets were disrupting his life by using special – using technology codes and profiling to disrupt classes; that a Colonel Bowman has a scanner to detect him when he's being accosted electronically, and he confronted a female athlete in asserting her use of a cell phone as a tracking device.

I mean, these are very unusual complaints, are they not?

MS. SANDERS: We'll concede, Your Honor, they [9] are unusual complaints. I will also posit, however, that the supreme court has said in Burlington that the actual nature of the complaint itself is not really what's relevant in a retaliation matter. I mean, his claims may have been unusual. To what degree they were actually investigated is not clear, other than the university did not believe they had any merit.

That being said, the university used his actual filing of the complaint as the basis to request for him to undergo a procedure which, based on the prior history and the settlement agreement, they would have realized that Dr. Silva was not going to submit to. It was not a request. It was a demand. A date and time had already been set for the appointment.

THE COURT: Whether you call it a request or demand, an employer has a right to give directions to an employee, does it not?

MS. SANDERS: Yes, Your Honor, an employer can give direction to an employee. Our position would be that when that direction is designed to create a situation that they know the employee cannot tolerate or will not stand for and lead them to resign or quit.

THE COURT: What information is there that the employer did it for that purpose?

MS. SANDERS: Our position would be – if you [10] refer to Dr. Silva's affidavit, it was the understanding when he came back – when he was reinstated in late 2002 that that negative information would be expunged from his record, and it was his understanding that he would not be asked to submit to an independent medical exam again.

THE COURT: That was part of the agreement?

MS. SANDERS: That was his understanding of the agreement as stated in his affidavit.

THE COURT: The agreement is here? Where is it in the agreement?

MS. SANDERS: I believe the defendant did point out in its – I don't know if it was a motion or the reply, but the agreement does not expressly state that there will be no more IME requests.

THE COURT: I'm looking at the five-page settlement agreement and it, among others, says he will be subject to the policies and procedures of the

university. It says what he's going to receive. It says he would -- that the university would expunge negative records.

Is there any contention that they didn't expunge negative records?

MS. SANDERS: It is our contention that Dr. Silva does not know whether or not that was expunged [11] or not.

THE COURT: That's not an issue for the purposes of today's hearing.

MS. SANDERS: Right. Not for purposes of the retaliation, though one might infer that that information was not expunged if in fact his second – his 2003 EEO claim triggered concern on the university's part. They may have been able to have access to the prior –

THE COURT: When you're telling me that he believed that part and parcel of this agreement was an agreement not to ever make him have to go through an IME again, isn't that at odds with Paragraph 5 that specifically says that he acknowledges that he does not rely and has not relied upon any representation or statement not set forth, etcetera, in this agreement?

MS. SANDERS: I would suggest, Your Honor – and I am not sure that we pleaded that.

THE COURT: I was quoting from the actual –

MS. SANDERS: No, I understand. If you refer to our – I don't know which exhibit that is. If your question was, would that conflict with part five –

THE COURT: Well, yeah. You're telling me that he reasonably believed after signing that settlement agreement that he would never again – or at least not [12] in the immediate future – be requested to undergo an independent medical examination. Now, after he signed that agreement, it wasn't – when simply out of the blue that the university requested it that he filed another complaint of discrimination, and in that complaint of discrimination he maintained that through the use of cellular telephone, scanners and other devices his movements were being monitored by the university and its contractors, and the Equal Employment Opportunity officer for the university looked into that and found no evidence whatsoever that that was going on. And when he looked at this list of alleged conspirators provided to him by Dr. Silva, he had serious concerns about the mental stability of Dr. Silva.

Are you contending that he didn't, in fact, have that? That was bad faith on his part?

MS. SANDERS: I would say that we are contending that the university, even when they reinstated him, has always questioned any information that Dr. Silva has brought to them, and looked at it with a jaundiced eye which would have, in fact, been in violation of the settlement agreement to expunge negative information. I know that the EEO

officer states that he did investigate, but quite frankly I [13] don't see the evidence that – strike that.

When the demand for the – to submit to the was submitted to Dr. Silva, it was premised on the fact that, you have filed another EEO claim. It wasn't premised with, we're concerned you said some things that are odd. It was just, you have filed a claim and you're going to submit to an IME; here's the date and time.

Dr. Silva, given his history with the university, was quite fearful that if he submitted, they would use it to justify his termination and if they didn't submit it, they would use it to justify his termination. So, he was between a rock and a hard place at that point.

THE COURT: Well, the information he submitted in connection with his – by way of supplementation of his complaint was breathtaking in its scope. I mean, this is basically saying, everyone's out to get me type list of. Virtually the whole staff of the university. I mean, he's got the R.O.T.C. Commandant, his cadets, his staff. He's got the Assistant Director of Athletics, the cheerleading coach, the football head coach, the track coach, the women's basketball coach. It goes on and on and on. I mean, it's rather breathtaking in its scope.

[14] And Mr. Isaac, who I would presume is a qualified Equal Employment Opportunity officer, meaning he has some qualification dealing with this, has provided an affidavit indicating this history and him not being able to find any information to support

any of this and that, as a result of this, he had serious concerns about his mental stability.

Why would that not serve as a good faith basis for an employer to request – as would be its rights under existing policies of the university – an independent medical examination to ascertain why this person is alleging this vast conspiracy of numerous people employed by the university, contracted by the university, students of the university to have a conspiracy against him and track his every movement with cell phones and so forth? I mean, it is a rather breathtaking series of allegations.

MS. SANDERS: I would posit, Your Honor, that in the prior EEO claim from 2000, when similar claims were made and Dr. Silva did submit to the independent medical exam –

THE COURT: I don't have those claims before me.

MS. SANDERS: I'm saying that it has been shown before – and the university was well aware – that [15] despite this rather elaborate conspiracy, that Dr. Silva believed that it was shown by their own physician to be harmless. Therefore, why the same claims should trigger the university to request an IME given that history. That is what I – that, we would argue –

THE COURT: Is it your position that the university's request for an IME was under the circumstances of this case unreasonable in light of the

prior disposition by settlement of his discrimination complaint?

MS. SANDERS: Yes.

THE COURT: Now the matter is before me not on a motion to dismiss which was the deficiencies that the Fourth Circuit found in my prior disposition of this case. It is now before me on a motion for summary judgment, which puts it on a significantly different footing than was the case the last time it appeared before me.

Can you tell me how you have placed at issue any genuine dispute that is material to the disposition of this motion?

MS. SANDERS: I believe, Your Honor, based on Dr. Silva's affidavit, and the documentation presented that we attempted to place and to convince this court [16] that there is a dispute as to the reason behind the request for that IME. Dr. Silva's testimony – affidavit testimony is that he would not be subjected to that again when he returned to the university.

THE COURT: How can I credit that as being material for purposes of this motion, and how can I credit it when there's nothing that he's submitted other than his statement, which is at odds with the clause of the agreement that I read to you that there were no other conditions or promises outside the scope of the agreement?

I mean, is there any document that you've attached, or anything that would show that there in fact was another understanding not contained in the agreement that provided for him to be exempt from any future requests for an IME?

MS. SANDERS: Your Honor, beyond what we have already discussed, I do not believe there is any other document or letter that would add to that, other than Dr. Silva's statement.

THE COURT: Let me ask you this. The disposition of this case by the Fourth Circuit was primarily on the basis that this was a motion to dismiss that I had to, as is always the case on a motion to dismiss, reach the conclusion that the [17] plaintiff can prove no set of facts in support of his claim which would entitle him to relief, and I'm required to take all well pled allegations as true and construe all factual allegations in the light most favorable to the plaintiff.

The court then concluded that following that very forgiving standard that there was a sufficient temporal connection between the termination, the decision and the EEOC complaint, that at least for purposes of the motion to dismiss a prima facie case had been established or could be established based on that set of facts.

As the defense points out, there are other cases that have found periods of time in that magnitude not sufficient to establish a prima facie case, but I will accept for purposes of discussion today that for purposes of a

motion to dismiss that the complaint sufficiently set forth under the 12(B)(6) forgiving standard a prima facie case. We're now here on summary judgment. And if I assume for the moment that you have established a prima facie case, how do you fair under the McDonnell Douglas burden shifting analysis?

And by that I mean the analysis once the prima facie case has been established, the burden shifts to [18] the employer to present a legitimate, nondiscriminatory reason for the adverse employer action taken against the plaintiff. Here the university has posited for me a legitimate, nondiscriminatory reason they believe. Namely, that he declined to undergo an independent medical examination of his mental status which they believe was reasonable in light of the rather far reaching, to put it mildly, allegations he was making, and that if they have met that burden of production then you, the plaintiff, are required to prove by a preponderance of the evidence that the legitimate reasons were not his true reasons but were a pretext.

How have you survived the McDonnell Douglas burden shifting standard assuming you've made out a prima facie case?

MS. SANDERS: We would take the position that we've shown pretext, and in that sense you would have to look back at the history between the parties and how prior claims have been handled, prior IME results, that there was a history where they understood that Dr. Silva's condition was not a

danger to anyone or that he was not a danger to himself or anyone.

THE COURT: Where is that information you're giving me in this record? You've told me today that [19] the prior case involved similar concerns of the university, that he was making bizarre allegations and that an IME was done and that the IME concluded that he really wasn't of any harm to anybody and that he was okay.

Where in your papers is that?

MS. SANDERS: Your Honor, we did not submit Dr. Shulman's report as that was still an issue since there was still a pending motion regarding IME. So, his report was not entered as a separate exhibit. It was only referred to in Dr. Silva's affidavit.

THE COURT: So I don't have anything before me on that issue that you're asking me to rely upon; is that right?

MS. SANDERS: Beyond what we have stated, Your Honor, no, we don't have that though – beg the court's indulgence. I was looking for Mr. Isaac's affidavit.

THE COURT: Are you indicating to me that there's an outstanding discovery issue? Was that what you said?

MS. SANDERS: I believe, yes, that the university – before the case had been dismissed, there was still a pending motion on taking an independent

medical exam in this matter. And I [20] believe when they filed their motion for summary judgment, they had raised that issue. Or maybe it was the status report.

THE COURT: I'm looking.

MS. SLAFF: We assumed discovery was closed, Your Honor, at this point.

THE COURT: I don't see any outstanding notice.

MS. SANDERS: I just remember that being referenced and that that occurred prior to my involvement.

THE COURT: The bottom line is, when a party in the position of Dr. Silva wants to oppose summary judgment, it is a significantly different standard than that for a 12(B)(6) motion, and the cases repeatedly say that a nonmoving party may not rest upon mere allegations or denials of his pleading but must set forth specific facts showing there's a genuine issue for trial and, you know, I don't know where I have in front of me something that would be enough to overcome the burden shifting analysis under McDonnell Douglas, even if I assume the existence of a prima facie case.

I mean, I have at this stage – at summary judgment – serious reservations as to whether there is a prima facie case and whether under all the [21] circumstances that have been presented to me the temporal element is sufficient.

But I don't think I need to view the case solely on the basis of the absence of a temporal element, but you're contending that this termination of your client violated federal discrimination statutes and it's – in order for him to establish a prima facie case, he's got to establish several factors that I have a serious question about, one of which is whether he was performing his job duties at a level that met his employer's legitimate expectations.

In any event, how have you sufficiently responded to the university coming forward under the McDonnell Douglas test with its reasons why it believes the termination was appropriate and demonstrated by preponderance of the evidence that these are not its real reasons and they are pretext for discrimination?

MS. SANDERS: We would state that we believe that the settlement agreement, along with Dr. Silva's affidavit testimony and the statement of the university itself that the termination was – the demand for the IME, rather, was based on his filing of the EEO complaint show the reasoning there was that he would not submit to that knowing.

[22] THE COURT: If you look at the affidavit submitted by the EEO officer, it appears that his determination for the IME was not triggered by the original filing which I assume was a relatively brief document but, rather, by his amplification of it and the breadth of the number of people he claimed were monitoring his every waking activity.

MS. SANDERS: Right. In his second filing. His 2003 filing.

THE COURT: I couldn't hear you, ma'am.

MS. SANDERS: I said the 2003 filing. That was the second filing.

THE COURT: Yes. For the 2003 filing it was this vast conspiracy he was alleging that caused him to conclude that there ought to be an evaluation of his mental status.

I mean, it seems, just to the neutral observer, that this was a rather breathtaking allegation. You know, everybody's following me around and watching me, and that's all part of a vast conspiracy. It does – I'm not sure what the appropriate psychiatric term is, but it would certainly indicate that a person has unrealistic suspicions of others activities, and that could be a significant mental health issue that ought to be looked into as a reasonable employer, should it [23] not?

MS. SANDERS: I would add, Your Honor, there is no allegation by the university that Dr. Silva wasn't actually performing up to their expectations – he was teaching – was performing his teaching duties up to their expectations.

THE COURT: The termination decision in this case was made for the his refusal to undergo the IME; correct?

MS. SANDERS: Yes. Correct. That's the university's position.

MS. SANDERS: The plaintiff's position is that they knew he would not submit to an IME, yet they still demanded that he do so knowing that that would render his continuation in that position intolerable for him.

THE COURT: How do I know that they knew he wouldn't consent to an IME? I don't believe there's any document that would state that they – there's no memo where they say, we asked him to do this and he refused, and we can then fire him.

THE COURT: Well, his affidavit says that he viewed the university's demand that he undergo another IME as a breach of the settlement agreement and he believed that the appeals committee was not the proper [24] forum to resolve the breach.

Where is there any indication that the university, when it asked for the IME, knew that it was in breach of the settlement agreement, breach of some side understanding, or that they knew before they asked him that he'd refuse to do it, other than the fact that he was behaving unusually and that might be expected because of his unusual behavior. But other than that possibility –

MS. SANDERS: There is no document.

THE COURT: You're essentially saying that this IME request was a setup to get rid of him.

MS. SANDERS: That would be plaintiff's position, Your Honor, but there is no document or –

THE COURT: What I have before me – and I'm trying to judge the motion under the appropriate standard, with all inferences in your favor – is that there was a prior complaint and there was a prior settlement. Beyond that though – and the mere fact of a prior settlement – I'm hearing from you that you know details about the prior IME and I don't know what – to what degree I have that information before me on this summary judgment motion.

MS. SANDERS: The only degree to which that's before you would be Dr. Silva's prior testimony that [25] the report of the doctor was not included, as that was considered –

THE COURT: Well, he is stating in three of his affidavits that the settlement agreement provided, among other things, that he would be reinstated to his position, which he was, and that he would not be required to undergo another IME as a condition of his employment. That's not anywhere within the four corners of that document.

How can I infer or read that into it under the circumstances of the case?

MS. SANDERS: I would have to defer to the court on that. The only offer – what information we have gleaned during the discovery phase of –

COURT REPORTER: You're going to have to speak up. I can't hear you.

MS. SANDERS: I can only glean what information was gleaned during the prior discovery and Dr. Silva's own testimony.

THE COURT: I don't know what the nature of the prior concern was that caused a request to be made for an IME that was requested and in fact conducted. I don't know if it was because he was worried about flying saucers, whether he was worrying about people with cell phones following him around, or whether it [26] was something else.

Is a mere fact that somebody has once upon a time been required to undergo an IME, files a complaint and settles it, mean that all future IMEs are to be viewed as suspect, even if there's different fact?

I mean, I'm assuming – I don't have anything to indicate to the contrary that the facts that he reported to the EEO officer are accurate. I don't believe you've placed at issue the correctness of the university's position that these are the things that he reported to the EEO officer, this large laundry list of university employees, students and contractors who were monitoring his every motion using scanners and cell phones to do so. That all came out of his lips, didn't it?

MS. SANDERS: That did, Your Honor.

THE COURT: I don't think I hear representing to me that that's the exact same thing that he complained of before, is it?

MS. SANDERS: Frankly, Your Honor, I don't remember the exact claim before. I believe it was similar in nature to a lot of surveillance.

THE COURT: Perhaps what happened is his mental condition may have deteriorated, that there may have [27] been some quirky things about him – I'm quirky myself and people might want to get me checked out. But here, on its face, the breadth and extent of his complaints seem to be – at least to me – it's not for me to decide that – delusional. And that if I'm a university that has him it my employ as a professor and he's making complaints that are either delusional or there's to the most vast conspiracy ever seen before operating at this university, even if he had some minor mental issue of a different nature that led to a prior IME request, that led to a complaint that was ultimately settled, I don't know that that suddenly means that the university is on an inadequate footing in requesting an IME, when complaints that appear to be delusional are made.

MS. SANDERS: Your Honor, I would only suggest that counsel is in somewhat of a difficult position as well as cannot challenge the merits of Dr. Silva's underlying claim. I was not his counsel during the time he made those claims.

I would call the court's attention to the supreme court's finding in Burlington suggesting that perhaps the underlying claim – the details of that claim was not truly an issue when discussing retaliation. If the

plaintiff believes that their [28] underlying claim was accurate, I cannot now argue that it was not.

THE COURT: Well, all I'm saying is that I don't hear the plaintiff saying, I didn't complain about all those things.

MS. SANDERS: The plaintiff is not saying that.

THE COURT: I think most of what the university's placed before me came out of his own mouth from the form he filled out from the supplementation of it and his own words in his deposition that these are – there is this vast conspiracy he's alleged, the breadth of which is breathtaking. If there is not an issue as to whether or not he made this bizarre set of allegations that, to some observers – to a reasonable observer might appear to be delusional, why does the prior history put this off limits for an IME?

MS. SANDERS: We would just fall back on the prior complaints that have been of a similar nature and that that information was known to the university.

THE COURT: Where do I know from this record that the prior complaints were of a similar nature? Where is that fact before me supported by affidavit, exhibit or testimony in a deposition?

MS. SANDERS: We do not have that appended to [29] our response.

THE COURT: I can't hear you.

MS. SANDERS: I said, we do not have that appended to our response.

THE COURT: If it's not appended, how do I consider it? I mean, that's the nature of summary judgment is to make sure I have before me matters that will show of the existence of a genuine dispute that would require trial, and I'm trying to probe with you as thoroughly and fairly as I can what basis you have for the allegations because you are entitled to the issues of facts that are before me. But if I don't have a fact before me at all, I can't create inferences in favor of the nonmoving party without having something in front of me. That's what I'm struggling with. I'm trying to be fair to you and your client.

MS. SANDERS: I understand, Your Honor. The plaintiff, Dr. Silva, chose not to present the IME – prior report – the prior IME report that was submitted to the university. He did not want to do that because he felt that would subject him to further humiliation. So, unfortunately, we did not append that to what you have before you now.

THE COURT: Let me hear from Ms. Slaff again.

[30] MS. SLAFF: Your Honor, I have not very much to say further, but I do want to make one point with respect to the issue about the IME and prior IMEs and current IMEs.

The university did not, as reflected in the agreement, make any representation related to future IMES, nor could it, as an operating institution, in coordination with the purpose of an IME, which is, as I stated, to protect the institution and the environment from issues, and to evaluate fitness or performance of duty. So, with respect to whether some prior IME precluded a future IME or any action taken by the university precluded a future IME, I would say that there's nothing in the record to establish that and that that would never have been something that we would have agreed to in the course of a settlement, because it would have tied our hands and potentially unfairly jeopardized the safety and well-being of the university, and that's all I have.

THE COURT: All right. This is an action that was originally filed in the Circuit Court for Prince George's County on or about February 4th, 2004. After service was effected, the defendant, Bowie State University removed the matter to this court and did so within 30 days of its service, service having been [31] effected on February 9th 2004.

Thereafter, the – while the case was pending in the Prince George's County Circuit Court, the defendant filed a motion to dismiss, which was opposed by the plaintiff, and then in June of 2004 an amended complaint was filed that added a fifth count of national origin, age discrimination and retaliation under Title 7 of the Civil Rights Act. Because that amended the complaint to include a federal cause of action, the defendant within 30 days of service of the

amended complaint adding these federal claims removed the matter to this court.

The defendant both answered and moved to dismiss the amended complaint and, after a series of scheduling delays, the matter was heard by this court on October 26, 2004. At the hearing on October 26, 2004, the court granted the motion to dismiss as to certain counts and directed the plaintiffs to amend the complaint for Count Four for reasons that were stated on the record.

An amended complaint in conformity with that was thereafter filed, and a motion to dismiss the second amended complaint was filed by the defendant. The matter came before the court on the defendant's motion to dismiss the amended complaint – actually, [32] it's the second amended complaint on June 21st 2005, and the court at that time granted the motion to dismiss.

The defendant's action granting the motion to dismiss was appealed to the United States Court of Appeals for the Fourth circuit, and in an unpublished opinion decided – rendered on February 10th 2006, the Fourth Circuit affirmed in part and vacated in part and remanded it for further proceedings. The aspect that was vacated and remanded dealt with the question of the retaliation claim. The Fourth Circuit in its opinion noted that the plaintiff had argued that the request made by the university was not an adverse – erred in finding that the medical examination was not an adverse employment action and that the

Fourth Circuit concluded that that was not error and that it was not an adverse employment action to request an independent medical examination and that issue is therefore no longer before the court.

What was of concern to the Fourth Circuit was that as to the retaliation claim, there was a sufficiently close temporal element between the time of the filing of the EEO complaint and the termination of the plaintiff, that that was sufficient to create a prima facie case of retaliation, at least in the [33] context of this case, involving a motion to dismiss as opposed to a motion for summary judgment. So, the matter was remanded to this court discovery was then I undertaken and the matter now returns to the court not in the guise of a motion to dismiss but this is time in the context of a motion for summary judgment. A motion for summary judgment has a significantly different standard than does that for a motion to dismiss. As I noted in my questions of counsel, a motion to dismiss should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief, and I'm required to and in connection with any must consider all well pled allegations in a complaint is true, and construe all factual allegations in the light most favorable to the plaintiff. That is the standard that relates to a motion to dismiss. That is not what is before me today.

Today what is before me is a motion for summary judgment, and that is the – a motion that applies the familiar standard under Rule 56 which provides that

summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show [34] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

A material fact is one that might affect the outcome of the suit under governing law, and in order to avoid such summary judgment the nonmoving party may not rest upon mere allegations or denials but must set forth specific facts showing that there's a genuine issue for trial. It is under that test that I must evaluate the motion for summary judgment that has been filed by the defendant in this case.

The facts concerning the filing by the plaintiff of his EEO complaint, as well as the supplementation of that complaint made at the request of the EEO officer, are all uncontroverted. There is no dispute whatsoever, and no amount of inferences can change the simple facts with regard to the filing of the complaint.

The circumstances surrounding the submission by the complainant of his complaint of discrimination are not controverted and are fairly detailed in the affidavit of Glen Isaac that has been submitted on behalf of the defendant. Glen Isaac is an Equal Employment Opportunity officer, and in that capacity he receives and investigates EEO complaints filed by [35] faculty, staff, and students. He indicates – and it's not controverted – that on January 26, 2003, the

plaintiff told his office to file a complaint against the university alleging discrimination on the basis of his religion, Southern Baptist, and his national origin, African National.

His complaint alleged that the university had violated his civil rights by monitoring his movements from internal and external groups on the campus. He contended that through the use of cellular telephone, scanners and other devices, his movements were being monitored by the university. He then provided a list of those individuals who he claimed had or have violated his rights, especially that of free movement on the campus.

The list is appended to Mr. Isaac's affidavit, and he indicated that the following individuals were involved in this monitoring activity: The R.O.T.C. Commandant, his cadets and his staff; the assistant director of athletics, including the lady director; the cheerleading coach; the head football coach and his assistants; the track coach and his athletes; the woman's basketball coach; a trainer; another assistant and some of his players; a construction and excavation contractor, including the driver of a truck; the [36] persons assigned to clean the gym and other buildings; and then another long list of people, apparently faculty members, because they all have – almost all of them have the word "doctor" in front of them, and then a long list of students and various classes that goes on for page after page after page, all of whom are alleged to have been engaged in a systematic effort to monitor his activities.

Mr. Isaac investigated these allegations and concluded that there was insufficient evidence to show that he had been subjected to the behavior – to behaviors that violated his civil rights. That's detailed in Mr. Isaac's memorandum to Dr. Silva dated February 21, 2003.

He also wrote another memorandum to him dated March 11, 2003 which recited essentially what I've just mentioned, and that is that he contended that a variety of persons were monitoring his movement and violating his civil rights.

He also contended that the university's police department, in conjunction with a company that was conducting construction on the campus was monitoring his movements electronically through scanners, computers and other electronic devices, and then the memorandum outlines again the list of persons and [37] entities and categories of people that he alleges have all joined to conspire against him.

The conclusion of Mr. Isaac was that there is no basis for Dr. Silva's assertions. The assertions, as I have indicated previously, were essentially that there was a vast conspiracy of university officials, professors, students, contractors, police, to monitor and restrict and otherwise impede his movements. After the information documented by Mr. Isaac in his affidavit was brought to the attention of the Human Resources Director of the university, he was directed to appear for an independent medical examination and he was advised of that fact by a letter from the

provost dated April 8, 2003. That latter letter was from the provost, and it outlined the history that I've just given of the complaint and the nature of the complaint, the nature of the allegations, and concludes that since he declined to submit to an independent medical examination, he was going to be terminated for cause for incompetence and professional misconduct, and he was advised of the appellate procedures available to him under Bowie State University's rules and regulations.

In his deposition concerning the allegations of his complaint, he was asked to explain it. His [38] deposition is attached as Exhibit C to the defendant's motion for summary judgment, and he related in that deposition his belief that these persons had special cell phones; that most of them are coded, some of them are used to contact special people that are highly placed. He said the rich have the money, have everything they think they can have in the country and they think they're above the law and that they have special equipment, and he thinks that's wrong.

He was asked about the long list of people in the athletic department as to whether they had special phones and he said, Of course. I'm dealing with group of people who are more or less - -I use the word conspiracy. They work as a team. There's an agreement there. There's an understanding within that group. If I don't belong to that group, I'm singled out.

As I mentioned previously, the defendant has moved for summary judgment contending that its

action to terminate the plaintiff for refusing to undergo an independent medical examination was not a discriminatory act, was justified by the circumstances of this case, and that his refusal to undergo an independent medical examination as employees of the universe are required to do upon request justified his [39] termination.

Plaintiff argues in opposition that his settlement of a prior discrimination complaint precluded the university from requiring that he undergo an independent med examination. The court has reviewed the settlement agreement in that case, which is dated April 23, 2002, and finds nothing that either express or implied within that agreement that indicates any such thing and, notwithstanding the forgiving summary judgment standard, I cannot read into this agreement terms that are not there, especially in light of the provisions of Paragraph 5 of that agreement that expressly states that the plaintiff does not rely and has not relied upon any representation or statement not set forth or described herein. In effect, he's asking me to disregard that and to read into this agreement a restriction on the university's right to request an independent medical examination when circumstances present themselves that would make that a reasonable decision for an employer to impose on an employee.

I conclude that that agreement certainly does not provide any basis for him to decline to submit to an independent medical examination. He also contends that in light of his prior history, he contends that a

[40] request for an independent medical examination in this case would be unreasonable and points, without any supporting documentation or affidavit, to the fact that he previously underwent an IME at an earlier date.

There is no indication of whether the independent medical examination was requested for exactly the same behavior, different behavior, orthopedic conditions, or any other kind of condition. There's just nothing before the court that would allow me to resolve inferences in favor of the plaintiff when there's absolutely nothing before me.

All I know is that there was a prior complaint of discrimination, that there was a settlement of that claim of discrimination, and a settlement agreement was entered into. I simply cannot, under the relatively forgiving summary judgment standard, read into these circumstances either a contractual agreement not to require an independent medical examination or something that would restrict the right of the employer to ask for an independent medical examination as a term or condition of employment.

Even if the university did not have the right under its regulations to require an independent medical examination, the circumstances of the [41] discrimination complaint in this case were such that it was entirely reasonable in the face of what I can only fairly describe as virtually delusional allegations of a vast conspiracy against the plaintiff to request such an examination because those kinds of delusions

could necessary – could possibly lead to inappropriate behaviors in the face of delusional thinking and that this is a university whose mission is to teach and to have its students protected while they're there, and I find absolutely nothing unreasonable about making the request, and I find nothing reasonable about his refusal to undergo that even though he may have had a history of being requested to do it before or on an earlier occasion under circumstances that are not before me and of which I have no knowledge.

In order for him to assert and demonstrate a prima facie case for retaliation, the plaintiff must demonstrate that he engaged in protected activity, which he certainly did; that an adverse employment action was taken against him, which it certainly was; but then that it has to show a causal link between the protected activity and the adverse action.

At the motion to dismiss stage, the temporal element was enough to at least allow the complaint to [42] survive, but now I'm faced with a very different set of circumstances in which the details for this request for an independent medical examination and all of the circumstances surrounding it are now before me. They're not before me in the bare bones context but, rather, have been fully fleshed out by discovery and extensive documents and are not off limits as they would be on a traditional motion to dismiss.

While I believe that I could revisit the issue of whether a prima facie case has been established, as I already indicated in questioning, I can certainly, as

an alternative to how this case fairs under the McDonnell Douglas burden shifting test conclude that there has not been a prima facie case made in this case. I simply find no causal link between the protected activity and the adverse action.

This is a case in which the request for the independent medical examination clearly arose as a result of his filing of a complaint, but it wasn't the filing of the complaint that triggered the IME. It was the nature of the allegations made in the complaint that were of such a vast conspiratorial and delusional nature that it fully justified the request for the IME and that the – any link between his termination, which was premised upon his failure to [43] appear for an IME, is simply not there in the context of this case.

There is no relationship between his filing of the complaint and the termination decision. What there is is a relationship between his refusal to take an IME that was reasonably requested as a result of delusional allegations made in connection with his EEOC complaint. So, I conclude that there is not a prima facie case. I will not rest my decision solely on that ground, because there is a relatively close temporal element.

And I will not disturb the ruling of the Fourth circuit at the dismissal stage, but here we have before us a university that's come forward with extensive information to justify its termination decision so that if a prima facie case has been established, we now

have to apply – because we're at summary judgment – a different analysis than would apply on a motion to dismiss, and that is to look at the McDonnell Douglas burden shifting test.

If I assume, as I will do, but only reluctantly, and only for purposes of argument, that the plaintiff has made out a prima facie case, the burden shifts to the employer to present legitimate, nondiscriminatory reasons for the action taken. In [44] this case the defendant has, I conclude, even viewing it in the light most favorable to the nonmoving party, more than adequately met the burden of production so that it now shifts that burden back to the plaintiff by a preponderance of the evidence that the legitimate reasons offered were not its true reasons but were a pretext for discrimination.

All I have before me to support the notion that this was not its real reasons is a vague allegation that a similar IME request was made under similar circumstances which is not documented and which is not before me, and I'm required to confine myself to the summary judgment record that's been developed now through the benefit of discovery that's been available to both parties.

I do not have any information before me as to what was the nature of the circumstances that caused the request to be made for the prior IME; I did not have before me the prior IME results, and all I have is a settlement agreement that is clearly, under the

circumstances of this case, not one that has been breached.

What I have before me is a fairly documented – using the words and documents of the plaintiff himself – series of allegations that on their face, and even [45] giving all the inferences to the nonmoving party are on their face delusional and alleging a conspiracy, the extent of which is simply unbelievable. I conclude that there is nothing before me that would allow me to conclude under the forgiving summary judgment standard, with all inferences in favor of the nonmoving party, that these reasons of the employer were not its true reasons but were really a pretext for discrimination.

All that the plaintiff has to try to meet that burden under the third step of the McDonnell Douglas burden shifting analysis is some sort of suspicion. These were not the true reasons, but I cannot – as exercising the gate keeping function, I'm required to exercise under the summary judgment process permit this kind of a case to go to trial when the employer, whether this is considered an aspect of the failure to make it a prima facie case or whether it's considered the employer's failure to prove by preponderance of the evidence under the third step of the McDonnell Douglas burden shifting analysis, and I cannot conclude that this is a viable claim that has genuine issues of material fact that warrant a trial.

For those reasons I will enter an order granting the defendant's motion for summary judgment [46] and closing the case.

Thank you very much.

(Off the record at 4:44 p.m.)

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[47] CERTIFICATE

I, Tracy Rae Dunlap, RPR, CRR, an Official Court Reporter for the United States District Court of Maryland, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the Jury Trial Proceedings in the case of LAWRENCE K. SILVA versus BOWIE STATE UNIVERSITY, Civil Action Number RWT-04-0234, on January 22, 2007.

I further certify that the foregoing 45 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, of said proceedings.

In witness whereof, I have hereto subscribed my name, this 12th day of February 2007.

TRACY RAE DUNLAP, RPR, CRR
OFFICIAL COURT REPORTER

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

LAWRENCE K. SILVA,	*	
Plaintiff	*	
	*	
v.	*	**Case No.: RWT 04-1984**
BOWIE STATE UNIVERSITY,	*	
	*	
Defendant	*	

* *

AFFIDAVIT OF GLENN A. ISAAC

1. I, Glenn A. Isaac, am over eighteen years of age and am competent to testify to the matters set forth herein.

2. I have been employed at Bowie State University in the position of Equal Employment Opportunity (EEO) Officer for 5½ years.

3. In that capacity, I receive and investigate EEO complaints filed by faculty, staff and students.

4. On January 26, 2003, Dr. Lawrence K. Silva, called my office to file a complaint against Bowie State University ("the University") alleging discrimination on the basis of his religion (Southern Baptist) and his national origin (African National).

5. In the course of my interview of Dr. Silva, he conveyed specific information to me that caused me to question his mental health and raised concerns for me that his behavior may jeopardize the

safety and well being of the University campus community.

6. Dr. Silva alleged that the University had violated his civil rights by monitoring his movements from and internal and external groups on the campus.

7. Dr. Silva maintained that through the use of cellular telephones, scanners and other devices, his movements were being monitored by the University.

8. Dr. Silva provided me with a list of those individuals who he claimed had or have violated his rights "especially that of free movement on campus."

9. The list included members of the University Army ROTC, the University Athletic Department, the University Campus Police, the Ferguson Construction and Excavating Corporation, an outside entity performing work at the University, University cleaning staff, and at least thirteen University faculty members, personnel and students. (Ex. A)

10. Based on my investigation, I found no evidence whatsoever to support any of Dr. Silva's claims that his movements were being monitored or that in anyway his civil rights were being violated.

11. Accordingly, on February 21, 2003, I issued a Letter of Finding concluding that there was no evidence that the University's employment requirements conflicted with Dr. Silva's stated religious beliefs as a member of the Southern Baptists faith; that there was no evidence that

the University treated Dr. Silva differently from other faculty members who are not African Nationals; and that there is no evidence to support his allegations that the University discriminated against him based on his national origin. (Ex. B)

12. Based on the list of alleged conspirators provided to me by Dr. Silva and the related information he conveyed to me, I had serious concerns about the mental stability of Dr. Silva as it may affect the safety and well being of members of the Bowie State University campus community. I, therefore, referred the information I had received to the Senior Human Resources Director at Bowie State University. (Ex. C)

I SOLEMNLY AFFIRM under the penalties of perjury and upon personal knowledge that the contents of the foregoing Affidavit are true.

/s/ Glenn A. Isaac
GLENN A. ISAAC